UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

IN RE: VALSARTAN, LOSARTAN, AND IRBESARTAN PRODUCTS LIABILITY LITIGATION

MDL No. 2875

THIS DOCUMENT RELATES TO ALL CASES

HON. ROBERT B. KUGLER CIVIL NO. 19-2875 (RBK)(KMW)

PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO PARTIALLY EXCLUDE OPINIONS OF DEFENSE CLASS EXPERT TIMOTHY E. KOSTY

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On the Brief: David J. Stanoch

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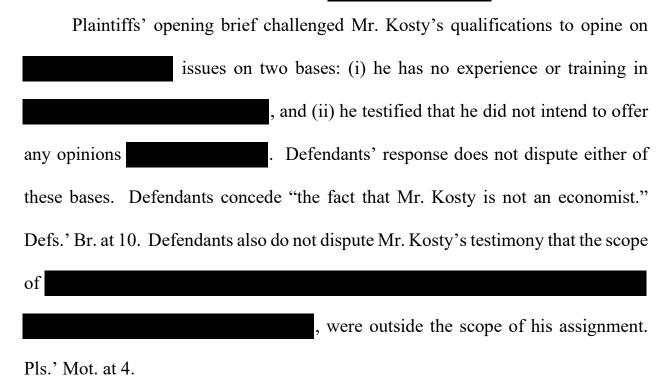
I. <u>INTRODUCTION</u>

Detendants'	response	confirms	that	their	expert,	Mr.	Kosty,	lacks
qualifications to opi	ne on					. Gi	ven his l	ack of
economic qualificati	ions, it is u	nsurprising	he tes	stified 1	hat he ac	tually		
				. N	otwithsta	anding	his admi	ission,
any such opinions he	e might off	er are unre	liable	and sp	eculative	. All o	f this wa	arrants
exclusion of his				if he in	fact still	offers	s them).	
Defendants'	response	also confi	rms tl	he ina	dmissibil	ity of	Mr. K	losty's
	opi	nions. T	heir 1	respons	se makes	s clea	r there	is no
disagreement that N	/Ir. Kosty	concedes						
Mr. Kosty's 1	remaining	challenged	opini	ons, or	n			
	, similarly	/ lack any 1	reliabl	e basis				
For these rea	sons, and	those expi	ressed	in Pla	intiffs' o	penin	g motion	n, Mr.
Kosty's opinions on								
shoul	d be exclu	ded.						

II. ARGUMENT

A. Mr. Kosty's Opinions Should Be Excluded

1. Defendants' Response Confirms Mr. Kosty Lacks Appropriate Qualifications to Offer Opinions

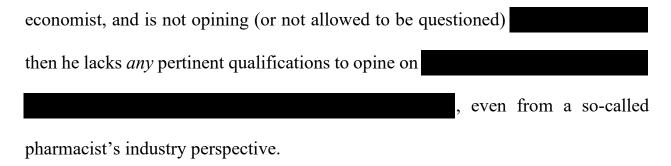


Instead, Defendants merely argue Mr. Kosty is "a pharmacist" and can testify as such. *See* Defs.' Br. at 1, 10. But Defendants took the *exact opposite* position at Mr. Kosty's deposition. There, when Plaintiffs' counsel attempted to question Mr. Kosty "

," they specifically objected. If Mr. Kosty is not an

id. at 291:2-5 (

¹ Pls.' Mot., Ex. 2 at 290:6-20 (



2. Mr. Kosty's Opinions Remain Unreliable, Unhelpful, and Unreliably Applied

Notwithstanding his lack of qualifications, Mr. Kosty's opinions remain unreliable and unhelpful for multiple reasons.

Defendants agree that Mr. Kosty "acknowledged that in a hypothetical world in which VCDs were not sold, there would be no supply curve." Defs.' Br. at 12. It is not a "tautology" that there would be no supply curve if the truth about Defendants' VCDs was known earlier. See Defs.' Br. at 12. In that instance, the same result that occurred in the real world (i.e., recall, FDA findings of adulteration, removal of VCDs from the market, etc.) simply would have occurred earlier. If the 'revelation' occurred earlier in time, the same result would have occurred, meaning all the VCDs purchased prior to disclosure were illegitimately supplied and, as Defendants put it, "anything paid for it would constitute damages." Id. at 11. Mr. Kosty's "acknowledge[ment]" of this renders his counter-factual speculation that

any reliable basis or provides any assistance to the factfinder.

totally speculative and at odds with the facts.²

Mr. Kosty's fractured but-for world, in which the truth was known earlier but a hypothetical class member still would have bought contaminated VCDs, is impossible because in his own hypothetical construct the VCDs would not have been available in the first place. Hence, opining that a hypothetical consumer still "valued" an adulterated drug, which by Mr. Kosty's ,³ simply lacks

Mr. Kosty's opinions also are unreliable and unhelpful not just because he failed to produce his own damages model that accounts for proposed offsets or, for unjust enrichment, Wholesalers' (not-produced-indiscovery) costs (see Defs.' Br. at 13-14), but because he never actually looked at Defendants' own underlying data to verify such offsets or costs might impact

And here, the undisputed evidence is that

every single Retail Pharmacy Defendant

See Pls.' EL Class Reply (ECF 2057) at 14 & n.26.

² Mr. Kosty's views do not even fit with Defendants' own flawed and ever-evolving . Defendants oppose class certification based on their alternative but-for world in which class members knew about the VCDs' adulteration, but might choose to buy them anyway. But Mr. Kosty

³See footnote 2, supra.

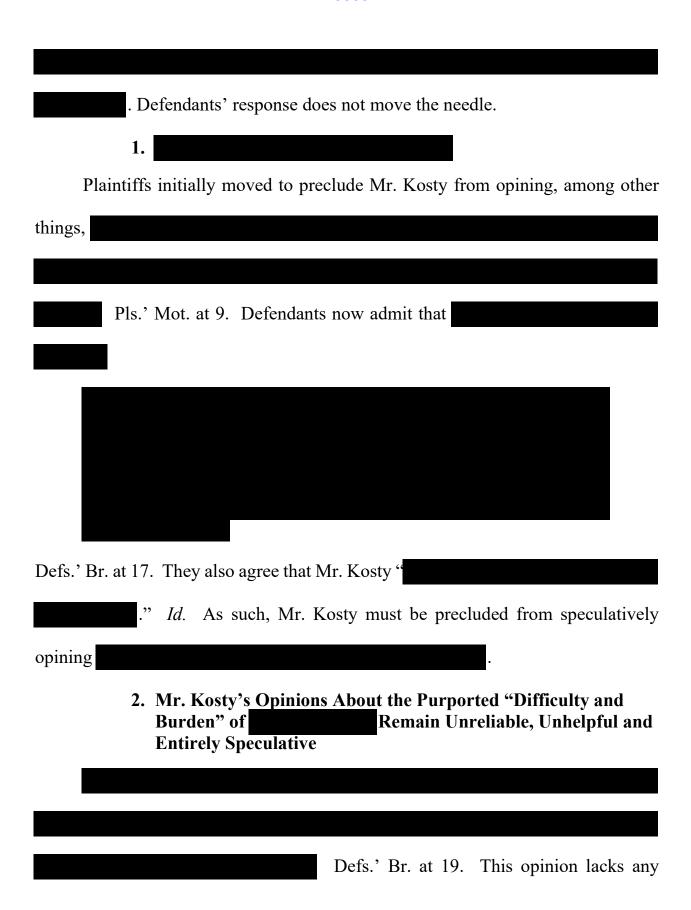
Plaintiffs' damages analyses, let alone quantify that impact. His absence of reliance on any underlying data means his opinions are the product of improper assumptions or guesswork. *See, e.g., Gen'l Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("there is simply too great an analytical gap between the data and the opinion offered").

Even a defense expert who identifies flaws in a plaintiff's expert's method (see Defs.' Br. at 13-14) still needs to review the underlying data. See, e.g., Hoefling v. U.S. Smokeless Tobacco Co., LLC, -- F. Supp. 3d – 2021 6051382, at *6, *8 (E.D. Pa. Dec. 21, 2021) (absence of supporting data renders opinion unreliable); Advanced Telemedia, L.L.C. v. Charter Commc'ns, Inc., No. 05-2662, 2008 WL 6808442, at *1 (N.D. Ga. July 17, 2008) (excluding defense expert that "did not actually review the underlying data"). And, of course, Mr. Kosty did not rely on any underlying offset or cost data, because Defendants never produced it. See, e.g., Pls.' Mot. at 7.

B. Mr. Kosty's Opinions Remain Speculative and Unreliable

Plaintiffs' opening papers demonstrated the undeniably speculative nature of Mr. Kosty's

To briefly recap, he speculates



reliability or basis in fact. Of course it will take some modicum of human effort for a claims administrator to verify class membership and process claims. But that process attends to every class action. It certainly does not defeat certification. See, e.g., Carrow v. FedEx Ground Package Systems, Inc., No. 16-3026, 2019 WL 7184548, at *6-7 (D.N.J. Dec. 26, 2019) (Kugler, J.) (certifying class of delivery drivers despite need to verify which had operating agreements with defendant, and whether each class member worked a "full-time" 30-hour workweek). Indeed, Mr. Kosty himself admitted " See Pls.' Mot. at 13 (quoting Ex. 2 at 219:16-22). And again, Mr. Kosty fails to . *Id*.

Are Equally 3. Mr. Kosty's Opinions on Unreliable, Unhelpful and Speculative

As initial matter, Defendants agree Mr. Kosty's flawed opinions about

Defs.' Br. at 20.

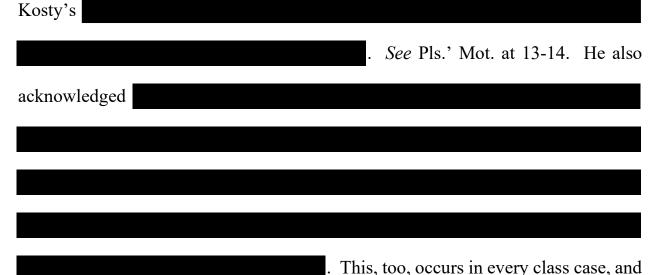
Defendants' hyperbole about "difficulty and burden" in "combining" data relating to TPPs' payments and medical monitoring consumers' purchases fall flat. These data are not impenetrable cyphers in unrecognizable code. They are payment data, based on decades-old industry standards, specifically designed to track and show how much was paid, for which product, by whom, and when. As Mr. Kosty readily admits,

also, e.g., City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc., 867 F.3d 434, 441-42 (3d Cir. 2017) ("Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership."); In re Namenda Indirect Purchaser Antitrust Litig., 338 F.R.D. 527, 550 (S.D.N.Y. 2021) (certifying TPP class based in part on Ms. Craft's opinions because "information necessary to [identify TPP class members] exists and can be collected from several institutional sources"). Moreover, courts frequently analyze or "combine" data in non-class cases. In those circumstances, courts do not simply throw up their hands and claim it is too complicated – they undertake the effort needed to ensure adequate analysis of the data. See In re Nat'l Prescription Opiate Litig., No. 1:17-md-2804 MDL 2804, 2019 U.S. Dist. LEXIS 141124, at *77 (N.D.

⁴ See also, e.g., In re Ranbaxy Generic Drug Application Antitrust Litig., 338 F.R.D. 294 (D. Mass. 2021) (certifying TPP class based in part on Ms. Craft's opinions); In re Zetia (Ezetimibe) Antitrust Litig., No. 18-md-2836, 2020 WL 5778756 (E.D. Va. Aug. 14, 2020) (same), adopted, 2021 WL 3704727 (E.D. Va. Aug. 20, 2021) (same); In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig., 335 F.R.D. 1 (E.D.N.Y. 2020) (same); In re Loestrin 24 Fe Antitrust Litig., 410 F. Supp. 3d 352 (D.R.I. 2019) (same).

Ohio Aug. 20, 2019) (finding expert reliable in non-class case who combined data from not only IQVIA, but the ARCOS database, as well as manufacturer defendants' own records, to determine trends in opioid prescribing and dispensing).

Were "combining data" even relevant to ascertainability (and it is not, as Defendants implicitly concede the Third Circuit does not require class plaintiffs to combine records showing class membership into a single mega-database, *see* Defs.' Br. at 21), the fact also remains that the only evidence about combining data is Mr.



is not fatal to the medical monitoring class definition as a whole, which is objectively defined and feasibly applied.⁵ Besides, ascertainability does not require Plaintiffs to

See Pls.' Mot., Ex. 4, at

333:7-22; *see also id.* at 336:8-342:7

⁵ Defendants are incorrect that Ms. Craft claimed she could not combine pharmacy records to identify consumers who meet the medical monitoring class definition. *See* Defs.' Br. at 24 & n.5. To the contrary, she testified that

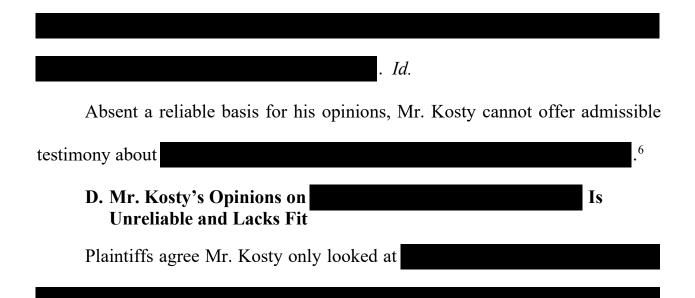
identify all class members now. *See, e.g., In re Namenda*, 338 F.R.D. at 549-550 (certifying TPP class based on in part on Ms. Craft's opinions); *see also Carrow*, 2019 WL 7184548, at *7 ("whether the class members are later found to be employees or independent contractors do not present any bar to identifying who they are at this time").

At bottom, Mr. Kosty merely relies on his own say-so, without any facts or data (and contrary to his own experience), to espouse his *ipse dixit* view about the purported ________, which is not even a relevant legal inquiry under Third Circuit law. Such bald assertions fall short of the standard for expert admissibility. *See, e.g., Joiner*, 522 U.S. at 146; *Bldg. Indus. Ass'n of Wash. v. wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012) (affirming exclusion of expert who "offered unsupported assertions" with "no data forming the basis for [the expert's] assumptions or conclusions... The party offering expert testimony has the burden of establishing its admissibility.").

C. Mr. Kosty Lacks Any Reliable Basis to Opine on

Plaintiffs' motion explained how Plaintiffs debunked all three of Mr. Kosty's examples of

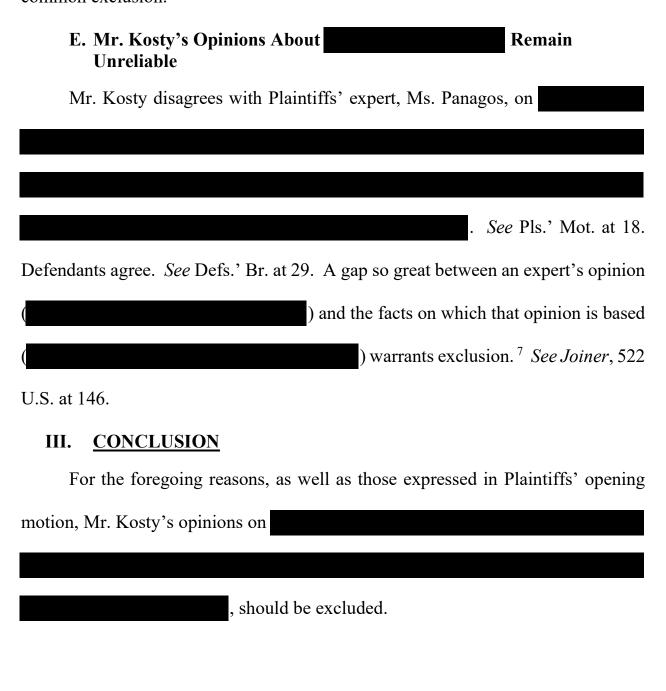
see Pls.' Mot. at 1617, and he acknowledged



Defs.' Br. at 23. Those numbers have nothing to do with the class period at issue, and do not speak to the employees in the particular states at issue. And Defendants are simply incorrect that Plaintiffs seek certification of claims under "52 states" as to Downstream Defendants, not the least reason for which is this Court dismissed certain state law claims against Downstream Defendants, and Plaintiffs' state law groupings obviously include far fewer than 52 jurisdictions. Because of this, Mr. Kosty's opinions simply do not fit the claims at issue, and unreliably rely on no data from the class period or about Manufacturer Defendants. Not to mention Defendants

⁶ There is no "inconsisten[cy]" between Dr. Conti's and Ms. Craft's treatment of state entities. See Defs.' Br. at 26. It was appropriate for Dr. Conti to exclude Medicaid managed care plans for purposes of damages, but also appropriate for Ms. Craft to identify these plans as potential class members for purposes of numerosity. There are still thousands of TPP class members even if none of these plans count as class members.

do not cite a single case that has ever refused to certify a class because of this common exclusion.



⁷ Even if this opinion were not excluded, it demonstrates a predominant *common question* pertinent to all TPPs' class members claims, *viz.*,

Dated: June 16, 2022 Respectfully,

By: /s/ David J. Stanoch
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On Behalf of MDL PEC and Class Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 16, 2022, a true and correct redacted copy of the foregoing was filed and served via the court's CM/ECF system, and an unredacted version was served on the court and the Defense Executive Committee via email.

/s/ David J. Stanoch
David J. Stanoch